

2013 JUN 26 PM 3:26

FILED

GARY FITZSIMMONS  
DISTRICT CLERK  
DALLAS CO., TEXAS

**NOS. W-05-41549-A**

**STATE OF TEXAS**

**V.**

**JOHNNY SUBIA  
Defendant.**

§ **IN THE DISTRICT COURT**  
§  
§ **292<sup>ND</sup> JUDICIAL DISTRICT**  
§  
§  
§ **OF DALLAS COUNTY, TEXAS**

**MOTION TO RECUSE**

**NOW COMES**, Movant, the Honorable Gary Fitzsimmons, District Clerk of Dallas County, Texas, and files this Motion to Recuse, and hereby shows the following:

**I.**

1. The judge subject of this Motion and sought to be recused is the Honorable Larry Mitchell, Judge of the 292<sup>nd</sup> District Court of Dallas County, Texas.

**II.**

2. On or about May 15, 2007, the Defendant in these writ cases, Johnny Subia, pleaded guilty to two counts of Aggravated Sexual Assault of a Child under 14 years of age and received 15 years in prison as an agreed sentence in Dallas County, Texas Cause Nos. F-05-41548 and F-05-41549.
3. Near the end of 2011, Judge Larry Mitchell issued several written Orders to the Movant, Gary Fitzsimmons, District Clerk of Dallas County, ordering the District Clerk to perform certain tasks related to operation of Judge Mitchell's Court. Due to civil service rules in place in Dallas County and the staff availability of the District Clerk's office, Movant was unable to comply with these Orders. In the beginning of 2012, after Movant was unable to comply with said Orders, Judge Mitchell issued an order to the Movant to appear at show-cause hearing for the Movant provide

evidence on why he should not be held in contempt of Court.

4. Through those very public contempt proceedings held in the beginning of 2012, it was no surprise that upon resolution of those matters, and relationship between Judge Mitchell and the Movant were strained. To this day, the relationship between Judge Mitchell and the Movant remains strained and distant, at best.
5. On or about June 7, 2012, the Defendant. Johnny Subia, filed Article 11.07 CCP Writs of Habeas Corpus in those cases, which were assigned case numbers W-05-41548-A and W-05-41549-A. In those writ applications, the Defendant alleges, *inter alia*, that his pleas were not voluntary and that he received ineffective assistance of counsel.
6. On May 22, 2013, the Texas Court of Criminal Appeals issued an Order to the trial court remanding these writ filings for further proceedings. In that Order, the Court of Criminal Appeals states that in the original application filed with the Court of Criminal Appeals, several pages were missing. In a supplemental filing by the Dallas County District Clerk's Office with the Court of Criminal Appeals on or about May 13, 2013, the complete writ applications were transmitted to the Court.
7. In the May 22, 2013 Order, the Court of Criminal Appeals further ordered the trial court to hold a "live evidentiary hearing" and to order the District Clerk of Dallas County, Gary Fitzsimmons, to appear at a hearing and answer 9 specific questions listed in the Court's order. The trial court was further ordered to "make findings of fact as to *whether the testimony of Fitzsimmons, and other witnesses who testify, is credible*" (emphasis added), and to "also make other findings of fact that it deems relevant to the District Clerk's procedures, practices, and policies relating to the

processing of Article 11.07 applications.”

8. On May 31, 2013, Gary Fitzsimmons filed in these cause numbers a response to the Order from the Court of Criminal Appeals. In that 13 page document, the District Clerk prepared written responses to the 9 specific questions asked in the May 22, 2013 Court of Criminal Appeals Order, and provided supplemental documentation to support those responses.
9. On June 4, 2013, the Honorable Larry Mitchell, Judge of the 292<sup>nd</sup> Judicial District Court, issued an Order to Dallas County District Clerk Gary Fitzsimmons to appear as a witness in hearing to be held on June 7, 2013 at 1:30pm. In that Order, Judge Mitchell stated that Mr. Fitzsimmons would be asked to respond to the nine specific questions outlined in the May 22, 2013 Court of Criminal Appeals Order.
10. On June 7, 2013, a hearing was held in the 292<sup>nd</sup> Judicial District Court pursuant to the Court of Criminal Appeals Order. The writ master, Lori Ordiway, Esq., testified and then the Movant, Gary Fitzsimmons testified. For well over two hours, Mr. Fitzsimmons answered specific questions posed directly by Judge Mitchell and fully answered the 9 questions put forth by the Court of Criminal Appeals. Following that hearing, Judge Mitchell stated that the hearing was to be continued so that further witnesses from the District Clerk’s Office could provide testimony. In the meantime, Judge Mitchell ordered that the District Clerk and several of his top managers still be held under the “Rule,” not allowing any of them to discuss this matter and/or the testimony of other witnesses.
11. On June 14, 2013, Judge Mitchell issued another Order in this matter ordering two additional members of the District Clerk’s Office to appear and provide

testimony at a continuation of a hearing in this matter on June 20, 2013 at 1:00pm. Following that hearing, Judge Mitchell informed undersigned counsel that he intended to again continue this hearing on June 27, 2013 at 1:00pm and further ordered that the Movant Gary Fitzsimmons re-appear to provide additional testimony, along with another top manager with the District Clerk's Office, Mary Ann Cannon.

12. Prior to the continuation of this hearing, this Motion to Recuse Judge Larry Mitchell was filed by the Movant.

### III.

13. A non-party has standing to bring a Motion to Recuse a Judge if there is an "existence of a justiciable interest in the case." *Whatley v. Walker*, 302 S.W.3d 314, 328 (Tex.App.—Houston [14<sup>th</sup> Dist.] 2009), citing to *Austin Nursing Center v. Lovato*, 171 S.W.3d 845 (Tex. 2005). In other words, a non-party has standing to file a Motion to Recuse if the non-party will be subject to a judicial determination. There is no question that Judge Mitchell, in these proceedings, will be making a "judicial determination" directly affecting the movant in this matter, as clearly shown by the May 22, 2013 Court of Criminal Appeals Order.
14. "A judge shall recuse in any proceedings in which the judge's impartiality might be reasonably be questioned." *Burkett v. State*, 196 S.W.3d 892, 896 (Tex.App.—Texarkana 2006) *no pet.*. In determining whether a judge's impartiality might reasonably be questioned so as to require recusal, the proper inquiry is whether a reasonable member of the public at large, knowing all the facts in the public domain concerning the judge and the case, would have a reasonable doubt that the judge is actually impartial. *Rogers v. Bradley*, 909 S.W.2d 872, 873 (Tex. 1995).

15. Once a Motion to Recuse is filed, the Judge **must take no further action in the case** (emphasis added) and either (1) recuse himself, or (2) forward the motion to the presiding Judge of the Administrative Judicial District for a Hearing. TEX.R.CIV.PROC. 18a (Vernon 2013), *In re Thompson*, 330 S.W.3d 411 (Tex.App.—Austin 2010). The Judge cannot make any other ruling, including on whether the party has standing to file a Motion to Recuse, except to choose one of the two options, *supra*. *In re Thompson* at 418.

#### IV.

16. The impartiality of Honorable Larry Mitchell might reasonably be questioned based on the relationship between the Judge and the Movant based on the facts herein. Due to the fact that the Court of Criminal Appeals is requesting that Judge Mitchell make a credibility determination of the Movant, the Movant has grave concerns about the ability of Judge Mitchell to maintain his impartiality to provide the Court of Criminal Appeals with the information that Court has requested.
17. Further evidence of Movant's concerns can be shown by the fact that Judge Mitchell is again requiring Movant to re-appear at another continuation of a hearing to provide additional testimony *after* he has already extensively answered the nine questions posed by the Court of Criminal Appeals in their May 22, 2013 Order.
18. It can be reasonably argued that based on the past experiences between the Movant and Judge Mitchell that Judge Mitchell has a personal bias or prejudice concerning the Movant in this case.


#### V.

This motion is brought for sufficient cause and not solely for the purpose of delay.

WHEREFORE, PREMISES CONSIDERED, Movant prays that the Motion to Recuse the Honorable Larry Mitchell from further service in the above-entitled and numbered causes be granted, and for such other and further relief that may be awarded at law or in equity.

Respectfully submitted,

SCHULTE & APGAR PLLC

By: 

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*Attorney for Movant, the Hon. Gary Fitzsimmons*

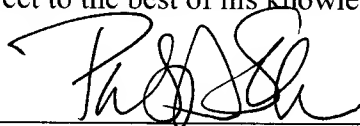
**VERIFICATION**

STATE OF TEXAS

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§

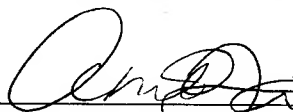
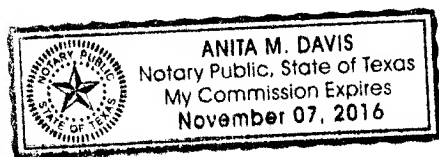
COUNTY OF DALLAS

BEFORE ME, the undersigned authority, personally appeared PETER A. SCHULTE, who, on oath, stated that he represents the Movant in this matter and that the statements made in the foregoing Motion to Recuse are true and correct to the best of his knowledge and belief.



\_\_\_\_\_  
PETER A. SCHULTE

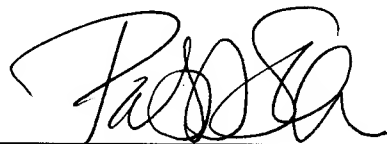
SUBSCRIBED AND SWORN TO BEFORE ME on this the 26 day of June 2013, to certify which witness my hand and seal of office.



\_\_\_\_\_  
Notary Public, State of Texas

**CERTIFICATE OF SERVICE**

I certify that on June 25, 2013, a true and correct copy of this Motion to Recuse was served by personal delivery on Catherine Bernhard at 133 N Riverfront Blvd, Dallas, Texas 75207 and to the Dallas County Criminal District Attorney's Office Appellate Division, located at 133 N. Riverfront Blvd, Dallas, Texas 75207.



\_\_\_\_\_  
PETER A. SCHULTE

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**ORDER**

On \_\_\_\_\_, the Court considered the Motion to Disqualify filed by the Honorable Gary Fitzsimmons, Movant, and is of the opinion that the same should be **GRANTED**.

**IT IS, THEREFORE, ORDERED** that the Honorable Larry Mitchell is recused from further proceedings in the above-entitled and numbered cause, and the Presiding Judge of this administrative judicial district is requested to assign another judge to sit in this case. The Honorable \_\_\_\_\_ will preside over this case until another judge has been assigned herein.

**SIGNED** on \_\_\_\_\_, 2013.

\_\_\_\_\_  
JUDGE PRESIDING



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**ORDER**

On \_\_\_\_\_, the Court considered the Motion to Recuse of the Honorable Gary Fitzsimmons, Movant, and is of the opinion that, pursuant to Rule 18a (f)(1)(B) of the Texas Rules of Civil Procedure, the Motion should be **REFERRED** to a judge to be assigned by the presiding judge of this administrative judicial district, in order to determine whether the Motion should be granted.

**IT IS, THEREFORE, ORDERED** that proceedings in the above-entitled and numbered cause are stayed until a judge has been appointed as provided by this Order.

**SIGNED** on \_\_\_\_\_, 2013.

\_\_\_\_\_  
JUDGE PRESIDING